Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, As Attorney General of the State of Vermont, SCOTT JOHNSTONE, As Secretary, Vermont Agency of Natural Resources,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's two-tiered approach to analyzing state economic regulation under the Commerce Clause, a state law that is found to discriminate against interstate commerce is generally struck down without further inquiry, while a state law that "regulates evenhandedly" and has "only incidental" effects on interstate commerce is invalid if, on balance, it imposes a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The question presented in this case is:

> Whether the second-tier "balancing test" of *Pike v. Bruce Church* requires a threshold showing that the state law places a "discriminatory" or "disparate" burden on interstate commerce.

The Second, Third and Seventh Circuits have answered the question in the affirmative; the Fifth, Sixth, Eighth, and Tenth Circuits in the negative.

CORPORATE DISCLOSURE STATEMENT

The National Electrical Manufacturers Association is a not for profit corporation that has neither a parent nor stockholders.

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PETITION FOR A WRIT OF CERTIORARI

The National Electrical Manufacturers Association (NEMA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-21) is reported at 272 F.3d 104. The opinion of the district court (App. 24-37) is reported at 72 F. Supp.2d 449.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2001. A timely petition for rehearing was denied on January 8, 2002. App. 22-23. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides: "The Congress shall have power . . . [t]o regulate commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

Vermont Statutes Annotated title 10, § 6621d(a) (1998, as amended 1999), provides in pertinent part:

> Effective March 1, 2000, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and the retailer may not knowingly sell, any of the following items at retail if they contain mercury added during manufacture, unless the item is labeled. The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a

> waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. Primary responsibility for affixing labels required under this section shall be on the manufacturer, and not on the wholesaler or retailer . . . . Items to be labeled are: . . . A lamp.

Vermont Solid Waste Management Rules § 6-803 provides in pertinent part:

> Mercury-Added Consumer Products
>
> To facilitate the source reduction of mercury from solid waste and to help ensure proper handling, recycling and disposal of waste mercury-added consumer products, certain mercury-added items must be labeled prior to sale.
>
> (1) After July 1, 1999, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the items listed in 10 V.S.A. §6621d(a) at retail if they contain added mercury, unless the item is labeled in accordance with Subsections 6-803(b) or (c).
>
> (2) Items to be labeled are: . . . (E) A lamp.
>
> The following labeling standards shall apply to all mercury-added consumer products listed in Subsection 6-803(a)(2) above:

(1) The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that mercury does not become part of solid waste or wastewater.

(2) A label must be clearly visible and legible to consumers prior to purchase of the product. The label must be located on a surface of the product that is visible during installation and removal.

(3) For labels affixed to products, the required words or symbols must be printed, mounted, molded, or engraved on the surface of the product using materials sufficiently durable to remain legible for the useful life of the product.

(4) For products with enclosed mercury-added switches, both the enclosed device and the larger product must be labeled.

(5) A listed mercury-added consumer product must be labeled if manufactured after July 1, 1999.

(6) Primary responsibility for affixing the required labels shall be on the manufacturer, and not on the wholesaler or retailer.

STATEMENT OF THE CASE

Mercury-containing lamps ("lamps"), such as the familiar fluorescent light bulb, are energy efficient

alternatives to incandescent lighting. Their use reduces energy production and results in a net reduction of the emission of pollutants (including mercury) into the environment. App. 26. Due to their energy efficiency and pollution-reducing qualities, the United States Environmental Protection Agency has made the use of fluorescent lamps a major element of the United States' global climate change efforts. JA 52.[1]

Vermont Stat. Ann. tit. 10, § 6621d and its implementing regulation, Vermont Solid Waste Management Rules § 6-803 (collectively the "Vermont labeling law" or the "law"), require that specified labeling be permanently affixed to both lamps themselves and their packaging. The mandated label, which no jurisdiction in the world but Vermont requires, must state that the lamps contain mercury, and that all such lamps must be disposed of by recycling or as hazardous waste.

The Vermont labeling law provides that "[p]rimary responsibility for affixing labels . . . shall be on the manufacturer, and not on the wholesaler, or retailer." Vt. Stat. Ann. 6621d(a). The labeling requirement has no effect on lamp manufacturers or manufacturing facilities in Vermont because none exist.

NEMA brought this constitutional challenge to the Vermont labeling law on behalf of its lamp manufacturer members, alleging that the law violates the dormant Commerce Clause.[2]

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[1] Citations with the notation "JA" refer to items in the parties' Joint Appendix before the court of appeals.

[2] NEMA also alleged that the Vermont labeling law violates the First Amendment and is preempted by the federal Resource Conservation and Recovery Act.

1. *The District Court Proceedings*. On November 8, 1999, following a three-day evidentiary hearing, the District Court (D. Vt., Murtha, J.) entered a preliminary injunction enjoining the Vermont labeling law insofar as it requires the labeling of mercury-containing lamps. App. 24-25, 36-37.

In a published opinion, the District Court made extensive findings of fact and concluded that NEMA had established a substantial likelihood that the Vermont labeling law violates the dormant Commerce Clause, applying the familiar *Pike* balancing test:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

App. 34 (quoting *Pike*, 397 U.S. at 142). The District Court held that the burdens of the Vermont labeling law are "clearly excessive in relation to the asserted local benefits," and that an "equally or more effective" and far less burdensome alternative exists. App. 34, 30.

Specifically, the District Court found that the Vermont labeling requirements are "onerous," operating only "at great cost to manufacturers." App. 34, 32. Lamps ultimately sold to end-users in Vermont are made by 11 domestic and foreign companies, utilizing almost 200 production lines in 60 manufacturing plants located on four

continents. App. 28, 31; JA 249-52, 56-57. Over 4800 varieties of lamps are manufactured and "shipped to [customers'] central distribution centers which serve large regions" of the United States. App. 28. As the District Court found, "[i]t is impossible [for the manufacturers] to predict whether any particular lamps will eventually end up on a particular retailer's shelf either in Vermont or anywhere else in the United States." *Id.*

Lamps sold in Vermont account for only about one quarter of one percent of the 600 million lamps sold annually in the United States, and an even smaller percentage of the 2.1 billion lamps sold worldwide. *Id.*; Supplemental JA 621. The costs of developing and implementing a separate production and distribution system only for Vermont lamps—because of such wide-scale replication of processes and facilities across the globe as would be necessary—is so great that "[a]s a practical matter, it appears manufacturers will either refrain from selling mercury-containing lamps in Vermont or will have to label all bulbs manufactured world-wide with the Vermont-required label." App. 29.

Moreover, labeling all lamps worldwide would raise serious practical and legal problems. First, "[i]t is apparent that labeled bulbs which find their way to jurisdictions other than Vermont will cause confusion in that they identify the product as a hazardous waste which must be recycled. However, no jurisdiction has established recycling facilities for mercury-containing lamps, a factor which may discourage potential purchasers from buying these admittedly energy-efficient bulbs." *Id.*

Only two states—Vermont and Minnesota—require that consumers recycle lamps or dispose of them as hazardous waste. JA 60-61. Thus, a label informing consumers in other states that lamps are to be recycled or disposed as hazardous waste would be false. However, the federal government requires that certain high volume users

throughout the United States must either recycle certain of these lamps or dispose of them as hazardous waste. JA 59-60. Consequently, a label informing users that it is only in Vermont and Minnesota that lamps must be recycled or disposed of as hazardous waste would also be false.

Second, "[t]here is only so much information which can be placed on lamps and packaging. Because of spatial limitations, any other state which may want to control the disposal of mercury-containing lamps by insisting on a different message would either have to abandon a labeling proposal or choose to be bound by Vermont's legislated message." App. 35.

Based upon extensive expert testimony, the District Court found an "equally or more effective" and far less burdensome way for Vermont to achieve its objectives. App. 30. This alternative would entail the posting of point-of-sale information signs in Vermont retail stores to inform consumers that lamps contain mercury and should be recycled or disposed as hazardous waste; the provision of the same information to wholesalers and commercial customers through commercial information sheets and invoice notices; and the development and provision of community educational information for Vermont communities. App. 29, 30, 34-35; JA 9-11.

Finally, the District Court held that because the State of Vermont cannot be required to pay damages for a constitutional violation due to its Eleventh Amendment immunity, the "great cost" that would be imposed on NEMA's members by the Vermont labeling requirements absent a preliminary injunction constitutes irreparable injury. App. 32-33 (citing *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2nd Cir. 1999) (irreparable injury will be found "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the

action the parties cannot be returned to the position they previously occupied")).

2. *The Second Circuit Proceedings.* The Second Circuit did not overturn any of the District Court's findings of fact, nor did it disagree with the District Court's determination that NEMA's members would suffer irreparable harm absent a preliminary injunction. Instead, it reversed the District Court's entry of the preliminary injunction based solely on the Court of Appeals' interpretation of the dormant Commerce Clause. The Second Circuit held, without citing any decision of this Court as authority, that a law "must impose a burden on interstate commerce that is *qualitatively or quantitatively different* from that imposed on intrastate commerce . . ." before balancing under *Pike* is required. App. 6 (emphasis added) (citing *Old Bridge Chemicals, Inc. v. N.J. Dept. of Env. Prot.*, 965 F.2d 1287, 1295 (3rd Cir. 1992); other citations omitted). "[I]f no such *unequal* burden be shown, a reviewing court need not proceed further." App. 6 (emphasis added); *see also* App. 7, 8 (a "disparate" or "disproportionate[]" burden is required).

The Vermont labeling law, the Second Circuit reasoned, does not meet this "unequal burden" requirement because the law imposes the same regulatory burdens on "lamp producers both inside and outside Vermont," not only on out-of-state producers. App. 11, 6. On this basis, the court reasoned that the state political process could be relied upon to regulate in accordance with the dormant Commerce Clause's federal imperative. App. 7, 12. The court reached that conclusion even though there are no lamp manufacturers or lamp manufacturing facilities in Vermont.

The Second Circuit identified two "types of burdens on interstate commerce [that] would qualify as 'disparate' to trigger *Pike* balancing": (1) "control of commerce that occurs wholly beyond the state's borders"; and (2) a "risk of

imposing regulatory requirements inconsistent with those of other states." App. 7-8. As to the first, the Court held that Vermont has not regulated outside its borders because the Vermont law does not "inescapably" require compliance with its labeling requirements outside of Vermont. App. 9. As to the second type of burden, the court held that other states have not yet imposed labeling requirements of their own, and thus there is as yet no "actual conflict" with the regulatory schemes of other states. App. 13.[3]

Having concluded that no "disparate burden" exists, the Second Circuit declined to address the district court's factual findings regarding the magnitude of the burden imposed by the labeling law or the existence of less burdensome alternatives.

On January 8, 2002, the Second Circuit denied NEMA's petition for rehearing and suggestion for rehearing

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[3] In the court of appeals, NEMA had argued that these features of the Vermont labeling law provided *independent* grounds for invalidating the law under the Commerce Clause, separate from the *Pike* balancing test. NEMA contended that the Vermont law directly regulates out-of-state commerce, because (i) its "practical effect" is to require labeling of every fluorescent lamp sold in the United States or the world; and (ii) it interferes with the ability of other states to regulate the labeling or disposal of lamps because the Vermont label suggests special disposal is required only in Vermont and because limited space on lamps and packaging would make it impossible for other states to require labels different from Vermont's. *Cf. Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336-37 (1989) (Connecticut statute unconstitutional because it "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."). The District Court agreed with NEMA's arguments. *See* App. 35 ("By proposing a labeling scheme which essentially requires lamp manufacturers to label all lamps in conformity with Vermont law, Vermont is presuming to legislate outside its own boundaries."); *id.* ("Because of spatial limitations, any other state which may want to control the disposal of mercury-containing lamps by insisting on a different message would either have to abandon a labeling proposal or choose to be bound by Vermont's legislated message.")

en banc. The Second Circuit and Circuit Justice Ginsburg denied NEMA's motion for a stay of the Second Circuit's mandate pending NEMA's filing of a petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION SIGNIFICANTLY ALTERS ANALYSIS OF STATE LAWS UNDER THE COMMERCE CLAUSE, AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Second Circuit's decision effectively eliminates the second tier of this Court's established dormant Commerce Clause analysis and deepens a split in the federal circuits. More specifically, the Second Circuit in accord with the Third and Seventh Circuits has held that, when a state law is challenged under the dormant Commerce Clause, the *Pike* balancing test does not apply in the absence of a threshold showing that the burdens placed by the law on interstate commerce are "disparate" or "discriminatory" compared with those placed by the law on local commerce. The decisions of the Second, Third and Seventh Circuits adopting this revisionist approach to Commerce Clause analysis conflict with decisions of the Fifth, Sixth, Eighth and Tenth Circuits and this Court.

The Second, Third and Seventh Circuits have effectively held that state laws that regulate interstate and intrastate commerce "evenhandedly" are per se constitutional, even if the burden that a law imposes on interstate commerce is clearly excessive in relation to the local benefits conferred. Indeed, the Second Circuit went even further in this case, declining to find a disparate burden sufficient to trigger a *Pike* analysis even though the burden of complying with the Vermont law falls entirely on interstate

commerce because there are no lamp manufacturers in Vermont. In the Second Circuit, therefore, a practical disparity is not enough to warrant application of the *Pike* balancing analysis. Instead, the discrimination must appear on the face of the statute.

Review is warranted to resolve the conflict on this important issue of constitutional law.

A. This Court Applies A Two-Tiered Analysis Under the Dormant Commerce Clause.

The Commerce Clause provides that "[t]he Congress shall have power . . . [t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States. . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (citing authorities).

The power-limiting aspect of the Commerce Clause—the so-called "negative" or "dormant" Commerce Clause—is founded on the "premise, well established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976) (citing *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976)); *see also Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 98-99 (1994) ("[T]he states are not separable economic units.").

The power-limiting aspect of the Commerce Clause is implemented through "what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986); *see General Motors Corp. v. Tracy*, 519 U.S. 278, 299

(1997) ("two strands of analysis") (citing *Brown-Forman Distillers*); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 762 (1995) (Kennedy, J. concurring, joined by O'Connor, J.) ("two modes of analysis") (citing *Brown-Forman Distillers*). The first tier of scrutiny establishes a ban against state laws that discriminate against or directly regulate interstate commerce. *E.g., Brown-Forman Distillers Corp.*, 476 U.S. at 579 ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.") (citations omitted); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism'" in violation of the dormant Commerce Clause "may be made on the basis of either discriminatory purpose . . . or discriminatory effect.") (citations omitted); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) (same) (citations omitted).

The first tier of dormant Commerce Clause scrutiny is not limited to state laws that facially discriminate against interstate commerce, but also extends to laws that are discriminatory in their "practical effect." *See Hunt v. Washington Apple Adv. Comm'n*, 432 U.S. 333, 352-53 (1977) (holding state law invalid because it "has the *practical effect* of not only burdening interstate sales . . . but also discriminating against them") (emphasis added); *Brown-Forman Distillers*, 476 U.S. at 575-76, 582-83 (invalidating, as a forbidden "direct[]" regulation of interstate commerce, a New York law that on its face applied only to liquor "sales . . . in New York," because the "'practical effect' of the law is to control . . . prices in other States").

The second tier of dormant Commerce Clause scrutiny applies to state laws that have "only *indirect* effects on interstate commerce and regulate[] *evenhandedly*." *Brown-Forman Distillers*, 476 U.S. at 578-79 (citing *Pike*)

(emphasis added); *see also Oregon Waste Systems*, 511 U.S. at 98-99 (balancing test applies to "*nondiscriminatory* regulations that have only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (balancing test applies where "the challenged statute regulates *evenhandedly* with only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added); *Edgar v. Mite*, 457 U.S. 624, 643 (1982) (balancing test applies "when a statute regulates interstate commerce *indirectly*") (citing *Pike*) (emphasis added). Under the second-tier balancing test, "evenhanded" state laws with only "indirect" effects on interstate commerce (*Brown-Forman Distillers*) are unconstitutional if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The balancing test includes consideration of "the nature of the local interest involved, and ... whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

This Court consistently has held that no discrimination is required for a statute to be reviewed or held unconstitutional under the second-tier balancing test. *See General Motors*, 519 U.S. at 299 n.15 ("[O]ur cases have indicated that even nondiscriminatory state legislation may be invalid under the dormant Commerce Clause, when . . . 'the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.'") (quoting *Pike*) (brackets omitted)); *see, e.g., Edgar*, 457 U.S. at 646 ("We conclude . . . that the Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause."); *Raymond Motor Transport v. Rice*, 434 U.S. 429, 447 (1978) ("[W]e are persuaded that the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative

contribution to highway safety."); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."); *see also U.S. v. Lopez*, 514 U.S. 549, 579-80 (1995) (Kennedy, J. concurring, joined by O'Connor, J.) ("One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 337 (1993) (Stevens, J. dissenting) ("The Court has long recognized that a burden on interstate commerce may be invalid even if the same burden is imposed on local commerce. . . . The fact that an impermissible burden is most readily identified when it discriminates against nonresidents does not justify immunizing conduct that evenhandedly disrupts both local and interstate travel.").

B. The Court of Appeals' Decision Deepens A Conflict In The Circuits and Conflicts With Decisions Of This Court.

Squarely in conflict with this Court's dormant Commerce Clause doctrine, the Second, Third and Seventh Circuits now require, as a prerequisite to applying the *Pike* balancing test, that the burden imposed on interstate commerce by the state law must be "discriminatory" (Third Circuit) or "disparate," "disproportionate," "different" or "unequal" to the burden imposed on intrastate commerce (Second and Seventh Circuits). *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3rd Cir. 1994) ("[U]nder this court's precedent . . . legislation will not be invalidated under the *Pike* test unless it imposes *discriminatory* burdens on interstate commerce.") (emphasis in original) (quoting *Old Bridge Chemicals, Inc. v. N.J. Dept. of Env. Prot.*, 965 F.2d 1287, 1295 (3rd Cir. 1992) (same));

National Electrical Mfrs. Ass'n, App. 6 ("For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is *qualitatively or quantitatively different* from that imposed on intrastate commerce.") (citing *Old Bridge Chemical*; other citations omitted) (emphasis added); App. 6 ("[I]f no such *unequal* burden be shown, a reviewing court need not proceed further.") (emphasis added); App. 7, 8 (requiring a "disparate" or "disproportionate" burden); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("No disparate treatment, no disparate impact, no problem under the dormant commerce clause."); *K-S Pharmacies, Inc. v. American Home Products*, 962 F.2d 728, 731 (7th Cir. 1992) ("Courts demand more than hypothetical rationality of statutes [under *Pike*] only when the laws create a *differential* burden on interstate commerce. . . .") (emphasis in original).

This superimposed prerequisite to the *Pike* balancing test is squarely in conflict with doctrine in the Fifth, Sixth, Eighth and Tenth Circuits, which have explicitly or implicitly rejected the "different burden" requirement. Moreover, the new prerequisite eviscerates the second tier of this Court's dormant Commerce Clause doctrine.

The Tenth Circuit has specifically rejected any "different burden" requirement, explaining that it is both illogical and inconsistent with the law established by this Court:

> Defendants contend that when a statute regulates evenhandedly, the extent of the burden the statute imposes on interstate commerce is irrelevant; the only inquiry is whether the statute imposes a different burden on interstate commerce than it does on intrastate commerce. Defendants' argument is

> not only circular, but it completely misstates the *Pike* analysis.
>
> By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce. Furthermore, the Supreme Court has made clear that the extent of the burden on interstate commerce is a key inquiry under the *Pike* analysis.

Dorrance v. McCarthy, 957 F.2d 761, 764 (10th Cir. 1992) (citations omitted); *accord Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers*, 27 F.3d 1499, 1511-12 (10th Cir. 1994) ("The . . . hazardous waste zoning ordinance operates evenhandedly because . . . it confers no advantages on in-state entities . . . as against out-of-state firms. Consequently, we must apply the balancing test set forth in *Pike*. . . ."); *id.* at 1512 ("[T]he [district] court erred by bypassing the balancing analysis required by *Pike*. The court's exclusive focus on animus against interstate interests neglected completely the role of the dormant Commerce Clause in prohibiting unreasonable incidental burdens on interstate commerce, even when there is no discriminatory animus involved against interstate commerce.").[4]

Moreover, the Fifth, Sixth and Eighth Circuits have all struck down non-discriminatory state laws under the *Pike* balancing test, without requiring any "discriminatory," "different" or "disparate" burden on interstate commerce as a

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[4] Respondents have asserted, incorrectly, that a later decision of the Tenth Circuit has abandoned *Dorrance*'s interpretation of *Pike* and substituted the Second Circuit's interpretation, *citing V-1 Oil Co. v. Utah State Dept. of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997). In fact, *V-1 Oil* specifically reaffirmed *Dorrance* as the authoritative "appl[ication of] *Pike* principles" in the Tenth Circuit. 131 F.3d at 1424.

prerequisite to the balancing inquiry. *See, e.g., Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 502-03 (5th Cir. 2001) ("The absence of . . . discrimination, either facially or in practical effect, removes [the challenged law] from the Supreme Court's definition of a discriminatory law. The controlling question thus becomes whether, under *Pike v. Bruce Church*, 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'") (quoting *Pike*); *Service Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75 (5th Cir.), *aff'd mem.*, 449 U.S. 913 (1980) (holding that *Pike*'s balancing test "assumes that the challenged law does *not* discriminate against interstate commerce" and striking down under *Pike* a law requiring all persons seeking employment within parish to register, whether they were from in-state or out-of-state) (emphasis added); *McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000) (holding statute unconstitutional because it discriminated in practical effect against interstate commerce and holding in the alternative that statute would be unconstitutional under the *Pike* balancing test: "Even were Ohio's statute not so obviously discriminatory as to subject it to strict scrutiny review under the dormant Commerce Clause . . . we would still find that the burden it imposes is 'clearly excessive in relation to the putative local benefits.'") (quoting *Pike*); *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 237 (6th Cir. 1986) (holding unconstitutional under the *Pike* balancing test a Michigan law requiring any natural gas company doing business within state to obtain state approval before issuing securities), *aff'd on other grounds*, 485 U.S. 293 (1988); *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000) (waste disposal ordinance struck down even though it "does not overtly discriminate against interstate commerce on its face, in its purpose, or through its effects[;] the ordinance may still violate the dormant Commerce Clause if the local interests that it serves do not justify the

burden that it imposes upon interstate commerce"); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 285 (8th Cir. 1993) (application of non-discriminatory Missouri banking laws to Nebraska lender violated *Pike* balancing test); *Burlington Northern R. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1986) ("It would not unduly tax the imagination to conceive of nondiscriminatory state legislation that advances some legitimate safety objective slightly, yet imposes massive burdens on interstate commerce. An analysis that disregards this fact by failing to balance the burdens imposed on interstate commerce against the local interest involved cannot be considered an accommodation of the competing demands of the state and national interests.")

As detailed above, the Second, Third and Seventh Circuit decisions also conflict with decisions of this Court, which never have required any element of discrimination or inequality of burden as a prerequisite to applying the second-tier balancing test. Such discrimination against interstate commerce is instead the *sine qua non* of a law's invalidity under tier-one review. *See* pp. 11-14 *supra*. As this Court has explained, "'discrimination' simply means *differential* treatment of in-state and out-of-state economic interests that *benefits* the former and *burdens* the latter." *Oregon Waste Systems*, 511 U.S. at 98-99 (emphasis added); *accord Bacchus Imports, Ltd.*, 468 U.S. at 273 ("Virtually every discriminatory statute allocates *benefits or burdens unequally*; each can be viewed as conferring a *benefit* on one party and a *detriment* on the other, in either an absolute or relative sense.") (emphasis added); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) ("Because nothing in the Indiana Act imposes a *greater burden* on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act *discriminates* against interstate commerce.") (emphasis added).

Laws that potentially implicate the Second, Third and Seventh Circuits' requirement of a "discriminatory," "different," or "disparate" burden should—according to this Court's settled doctrine—properly be adjudicated (valid or invalid) under the first tier of dormant Commerce Clause review. By imposing that same requirement as a prerequisite to the exercise of second-tier balancing, these circuits have rendered the second-tier test superfluous: Laws that do not discriminate against or directly regulate interstate commerce either facially or in their practical effect (and have thus survived tier-one scrutiny) by definition could not impose a "discriminatory," "different," or "disparate" burden so as to qualify for second-tier balancing.[5]

In short, the *Pike* test was designed to apply to laws that regulate "evenhandedly," *Pike*, 397 U.S. at 142, yet the Second, Third and Seventh Circuits now apply the test only if the state law does *not* regulate evenhandedly.

The decisions of these Circuits adopt an approach to Commerce Clause analysis that was expressly rejected by this Court decades ago. As the Court explained in *Raymond*:

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[5] The Second Circuit offers, as an example of a "disparate" or "disproportionate" burden that would "qualify" for balancing, a law's "control of commerce that occurs wholly beyond the state's borders" – i.e., a law's "extraterritorial operation." *National Electrical Mfrs. Ass'n*, App. 7-8, *citing Healy v. Beer Inst.*, 491 U.S. at 332, and *Brown-Forman Distillers Corp.*, 476 U.S. at 582. But in both *Healy* and *Brown-Forman*, this Court held the statutes at issue unconstitutional as *direct* regulations of interstate commerce. *See Healy*, 491 U.S. at 336-37 & nn. 13-14; Brown-*Forman Distillers*, 476 U.S. at 579, 584. In both cases, this Court applied first-tier analysis and never reached the second-tier *Pike* balancing test. The Court examined the state laws' "practical effect" and "struck [them both] down . . . without further inquiry" into claimed local benefits. *See Healy*, 491 U.S. at 336-37 & nn. 13-14; *Brown-Forman*, 476 U.S. at 579, 584.

> We acknowledge, as did the Court in *Bibb*, that there is language in [*South Carolina State Highway Department* v.] *Barnwell Bros.* [303 U.S. 177 (1938)] "which, read in isolation from . . . later decisions . . . would suggest that no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination against interstate commerce." 359 U.S., at 528-529. . . . But *Bibb* rejected such a suggestion. . . . [*Id.*] at 524, . . . *quoting Southern Pacific Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 775-76 . . . (1945). Thus, we cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce.[6]

434 U.S. at 443 (emphasis added), *quoted with approval in Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670-71 (1981).

The Third Circuit has purported to justify the "discriminatory burden" prerequisite on the ground that, if the second-tier balancing test is applied to a law that regulates in-state producers the same way as out-of-state producers, the effect will be to give out-of-state producers a right not enjoyed by in-state producers to challenge commercial legislation. *Old Bridge*, 965 F.2d at 1295. This

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[6] Although the Second Circuit sought to distinguish *Bibb* and *Southern Pacific*, those decisions (among many others) require application of the balancing analysis to state laws that are non-discriminatory and "even-handed."

Court has held, however, that a basic reason for judicial scrutiny under the dormant Commerce Clause is that out-of-state producers do not enjoy the political leverage enjoyed by in-state producers to participate effectively in a state legislature, so they need the judicial protection of the dormant commerce clause, whereas in-state producers do not. As this Court observed in *Southern Pacific*:

> [T]he Court has often recognized that *to the extent that the burden of state regulation falls on interests outside the state*, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

325 U.S. at 767-68 n.2 (emphasis added).

In short, the courts of appeals have split 4-3 on a recurring constitutional issue of great importance. This Court's decision in *Pike*—which established the modern second-tier balancing test—has been cited more than 790 times in the lower federal courts and state courts, and in more than 970 secondary sources (Westlaw KeyCite result for *Pike*). If this Court's unanimous decision in *Pike* is to be modified or overruled, it should be done by this Court, not by the courts of appeals. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

C. This Case Provides A Suitable Vehicle For Resolving The Conflict.

The District Court made extensive findings of fact in support of its ruling that the burden imposed by the Vermont labeling law on interstate commerce is clearly excessive in relation to the putative local benefits. That court found, among other things, that the labeling requirements are "onerous" and will operate "at great cost to manufacturers." *See* p. 5 *supra*. Because more than 4800 varieties of lamps are manufactured and shipped to customers' central

distribution centers serving large regions of the United States, "[a]s a practical matter, it appears that manufacturers will either refrain from selling mercury-containing lamps in Vermont or will have to label all bulbs manufactured world-wide with the Vermont-required label." *See* p. 6 *supra.*

Moreover, "[t]here is only so much information which can be placed on lamps and packaging." *See* p. 7 *supra.* Labeling all lamps as hazardous waste that must be recycled or disposed of as hazardous waste would cause widespread confusion, because only two states impose such a requirement on consumers. Informing users that lamps must be recycled or disposed of as hazardous waste only in Vermont and Minnesota would be false, because federal law requires certain high-volume users throughout the United States to engage in recycling or hazardous waste disposal. *See* pp. 6-7 *supra.* Finally, the District Court found that there were "equally or more effective" ways for Vermont to achieve its objectives with far less burden on interstate commerce. *See* p. 5 *supra.* There is a clear evidentiary record here supporting the application of this Court's second-tier balancing test under the dormant Commerce Clause, which makes this case a suitable vehicle for resolving the conflict among the circuit courts.

The Second Circuit did not overturn any of these findings of fact. Nor did it hold, or even suggest, that the Vermont labeling law could survive review under a traditional "even-handed" *Pike* analysis. Instead, the Second Circuit rested its decision solely on its holding that the *Pike* analysis applies only if the state law imposes an "unequal burden" on interstate commerce. App. 6-13.

Indeed, the Second Circuit's decision went even further, by holding that the Vermont labeling law is not subject to *Pike* analysis even though there are no Vermont lamp manufacturers or manufacturing facilities, and therefore the law, as a practical matter, places a disproportionate

burden on out-of-state businesses. In so ruling, the Second Circuit has disregarded this Court's cases holding that "[t]he critical inquiry [under the dormant Commerce Clause] is . . . the practical effect of the regulation . . . ." *E.g., Healy v. Beer Institute*, 491 U.S. at 336.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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